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In The
Supreme Court of the United States
October Term, 1987

NICHOLAS MARINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WASHOR, GREENBERG & WASHOR
Attorneys for Petitioner
291 Broadway
New York, NY 10007
(212) 732-2077

MICHAEL S. WASHOR
HARVEY L. GREENBERG
On the Petition

Dick Bailey Printers. 203 Port Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 608-7666 — (718) 447-5358 — (516) 222-2470 — (914) 682-0848

QUESTIONS PRESENTED

1. May a criminal defendant use the entrapment defense when he admits committing all of the acts constituting the offense charged but denies possessing the requisite criminal intent?

2. Did the extraneous evidence that came before the Petit Jury so prejudice the Petitioner MARINO, as to deny him a fair and impartial trial, his right of confrontation, his right of counsel and due process?

PARTIES

The Appellant in the United States Court of Appeals for the Third Circuit and the defendant in the United States District Court of New Jersey, was NICHOLAS MARINO.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NICHOLAS MARINO petitions this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit (hereinafter Circuit Court) to review the decision of that Court, which upheld petitioner's conviction for conspiracy to transport stolen securities in interstate commerce and to sell and dispose of said stolen securities in violation of Title 18 U.S.C. Section 371, and for receipt, sale, and disposition of stolen securities in violation of Title 18 U.S.C. Section 2315 and Section 2, and upheld the imposition of a sentence of incarceration for Eighteen (18) months and a fine of Five-Thousand (5,000.00) Dollars.

OPINIONS BELOW

The decision and Judgment of the United States District Court (Ackerman, J.), is set forth in the annexed appendix, "A".

The decision of the United States Court of Appeals has not as yet been published in the official reports but is set forth in the annexed appendix, "C".

JURISDICTIONAL STATEMENT

This Petition seeks review of a decision of the United States Court of Appeals for the Third Circuit, rendered on December 23, 1987, which decision affirmed petitioner's conviction for violating the provisions of Title 18 U.S.C., §§ 371, 2315 and 2.

This present petition was filed with this Court within 60 days of the date that the decision of the Circuit Court was rendered on December 23, 1987.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

2. The Sixth Amendment to the United States Constitution provides, in pertinent part, as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury, . . . to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense."

PRELIMINARY STATEMENT

This is an appeal by the petitioner, NICHOLAS MARINO, from a judgment of conviction had after trial before the Court and Jury (Judge Harold A. Ackerman), United States District Court, District of New Jersey, whereby the said petitioner was convicted under Counts I and III (petitioner ws found not-guilty under Count II) of Indictment Number 86-36, charging, respectively, under Count I, conspiracy under Title 18 U.S.C. 371, to transport stolen securities in interstate commerce and to sell and dispose of said stolen securities; and, under Count III, the substantive crime of receipt, sale and disposition of stolen securities in violation of Title 18 U.S.C. 2315 & 2.

Subsequent to the jury verdict, an evidentiary hearing was held on Petitioner MARINO's Motion for a new trial based upon the jury's receipt of extraneous material; that Motion was denied and petitioner MARINO was sentenced as follows: On Count I, Eighteen (18) Months incarceration and a fine of TWENTY-FIVE HUNDRED ($2,500.00) DOLLARS: On Count III, eighteen (18) Months incarceration and a fine of TWENTY-FIVE HUNDRED ($2,500.00) DOLLARS: The prison sentences under Counts I & III to run concurrently.

The United States Court of Appeals for the Third Circuit affirmed.

This petition asks this Court to review the Circuit Court's decision. Petitioner contends that his Constitutional rights were denied him in that he was deprived of the defense of entrapment although he admitted all of the acts constituting the offense charged but denied possessing

the requisite criminal intent; that this case presents unresolved issues of law as relates to the application of the defense of entrapment in that there is conflict in the Circuits in differing applications of the entrapment defense from Circuit to Circuit.

Presently pending in this Court, in the Matter of United States v. Mathews, 803 F. 2nd 325 (7th Cir.), *cert. granted,* __ U.S.__ , 107 S. Ct. 1601 (No. 86-6109) March 30th 1987, *argued* December 2nd 1987, 56 U.S.L.W. 3398-99 (U.S. December 8th 1987) is the identical issue raised herein.

Petitioner, also, timely moved in the District Court, seeking a new trial premised upon the receipt by the Petit Jury of extraneous evidence during deliberations which denied him his constitutional rights to a fair and impartial trial, right of confrontation, counsel, and due process. Although the District Court, after a complete evidentiary hearing examing all the Petit Jurors, concluded as a matter of fact and law that extraneous evidence did pervade the jury deliberations and that petitioner was denied his sixth amendment right of counsel, nonetheless denied the motion for a new trial.

On appeal to the Circuit Court, petitioner raised each issue alluded to above. The decision of the Circuit Court, dated December 23rd 1987, of which review is sought, rejected petitioner's contentions and affirmed his conviction, while recognizing the pendency of decision in *U.S. v. Mathews, supra,* in this Court.

STATEMENT OF FACTS

In early 1980, Sliker was introduced to the Petitioner NICHOLAS MARINO (hereafter Marino) by a mutual friend, a stockbroker, one Peter North; the purpose of the introduction was to put Marino in contact with Sliker who

represented himself as an entrepaneur in various business dealings and transactions.

There is no dispute that Sliker was and had been, for the greater part of his entire life, a professional criminal and schemer, a thief, government informer, and con-artist. Sliker, consistent with his modus operandi, enticed and lured Marino and his law partner Gulkin into several business deals whereby Marino and Gulkin had been baited into investing more than Two Hundred and Fifty Thousand Dollars. Unbeknown to Marino and Gulkin, all these deals and transactions were fraudulent and phony. It is undisputed that Marino was the victim of Sliker's beguilement. The financial loss eventually sustained by Marino and Gulkin was approximately One Hundred and Ten Thousand Dollars.

In December of 1980, Peter North introduced Marino to Morton Swersky, a New York attorney who represented himself as an individual involved in the legitimate practice of law specializing in arranging conglomerates and dealing in high finance.

Unknown to Marino, Swersky had engaged in a gold transaction with Sliker; he claimed to have entered into this gold deal on behalf of a client of his, Ora-Bright Co., a corporation solely owned by Ralph Angel.

Sliker claimed that he went to New York City and exchanged the gold on the public street, in front of Republic Bank, receiving One and One-Half Million ($1,500,000.00) Dollars in cash, in a brown paper bag, from two unknown individuals. Swersky claims to have been involved only at the request of his client and knew nothing about this transaction.

The following incidents and transactions occurred in January and February, 1981.

Co-defendants Kelly, Amato, Saluzzi, and Romano (who was acquitted after trial) had secured, illegally, stolen security bonds; there were two specific sets of bonds in question; to wit, One Million ($1,000,000.00) Dollars worth of Fort Meyer Bonds and One Million ($1,000,000.00) Dollars worth of Federal Home Loan Securities.

In an attempt to dispose of and sell the stolen bonds, Sliker was enlisted by Saluzzi, a co-conspirator and accomplice in the underlying scheme. Sliker had represented to these "thieves" that he would be able to dispose of these bonds for a substantial amount of money and all of them would split the proceeds.

Sliker attempted to utilize the Federal Home Loan Bonds as collateral for a loan; the government stipulated that there was independent verification that the Federal Home Loan Bonds were legitimate and not on any "stolen list."

He approached Gulkin and Marino who had been persistently persuing and threatening him for the return of One-Hundred and Ten Thousand ($110,000.00) Dollars on the phony metal transactions. Sliker proposed a transfer of securities which he represented as being legitimate and authentic bonds.

Sliker claimed that he would be receiving a substantial commission on the sale of this stock from his present employer, Kelly, and that his commission could be used to satisfy the indebtedness he owed Marino.

Sliker had independently verified, without the knowledge of Marino, that the Fort Meyer Bonds were not on any "stolen list," assuring, that, when Marino independently attempted to verify these bonds, he would learn that the bonds were legitimate and not stolen.

At the same time that Sliker proposed the transfer of bonds to Gulkin, Swersky approached and solicited Marino. Swersky had been previously arrested for stock swindling and was then an informer for both the New York District Attorney's Office, as well as the Federal Bureau of Investigation. Swersky was "working off" a pending felony crime committed by him. Swersky suggested to Marino that he had investors that would be interested in purchasing securities; Swersky proposed to Marino that a substantial amount of money could be made, legitimately, and that his investors would be only interested in "legitimate" securities. Swersky's status as an informer and "agent" for the F.B.I. was unknown to Marino.

In late January or early February 1981 Marino gave Swersky one bond from the Fort Meyer Series, which he had received from his partner Gulkin who, in turn, received the bonds from Sliker.

Contemporaneous with this transaction, and unknown to Marino, Mr. Gorbo, Swersky's attorney in New York, arranged for a finder's fee of 10% or One Hundred Thousand ($100,000.00) Dollars, to be the reward for the discovery of any stolen bonds, as a result of his client Swersky's efforts.

Before passing the Fort Meyer Bond to Swersky, Marino contacted a broker friend of his, Gene Gulka, and requested verification of the legitimacy of the Fort Meyer Bonds in question; Mr. Gulka, after verifying it through his brokerage house, confirmed that the Fort Meyer Bond was in fact legitimate and not on any "stolen list."

Swersky returned the Fort Meyer Bond to defendant Marino telling him that the bond was a "photocopy" and that he could not transact business in this manner. Within a

few days Marino, having discussed the matter with Gulkin, received the Federal Home Loan Bonds. These bonds were also proposed as legitimate and non-stolen securities. Marino once again verified that the Federal Home Loan Bonds were legitimate and not on any "stolen list."

Thereafter, Marino delivered the Federal Home Loan Bonds to Swersky, who in turn gave defendant Marino partial payment, approximately Thirty-Five Thousand ($35,000.00) Dollars. This money was given to Gulkin, who turned it over to Sliker. The money was never recovered nor accounted for. The delivery of the balance of the money and balance of the bonds was scheduled within a few days; at the time of the final meeting between Marino and Swersky, the F.B.I. interceded and suggested to Marino that he contact the F.B.I. after thinking about the matter over the weekend.

Marino advised his partner Gulkin immediately of the situation; both obtained counsel to represent them in this matter. Within the next several days, unbeknown to defendant Marino, Swersky and his attorney Mr. Gorbo appeared in Marino's office, uninvited, unsolicited and without an appointment. It was at this meeting that Marino learned that Swersky and Gorbo were interested in "straightening the matter out" for an amount of money. Marino advised both Swersky and Gorbo that he had an attorney and that the attorney would contact them. Marino received Gorbo's business card at that time.

The following day, Marino's attorney, Mr. William Martini contacted Gorbo and an appointment was made to meet in Swersky's office in New York City.

Mr. Martini and Marino attended the meeting wherein Gorbo and Swersky were present. A solicitation was made by Gorbo and Swersky, wherein Twenty-Five Thousand ($25,000.00) Dollars was requested as an expense "to straighten out" the matter.

The implication was clearly made that this was "bribe" money and that nothing would come of the situa-

tion when and if these monies were paid.

Upon leaving this conference Mr. Martini and Marino agreed that they would not in any manner or form participate in this illegal transaction and rejected the improper suggestions made by both Gorbo and Swersky.

Within a few days, Marino appeared at the United States Attorney's Office, Eastern District of New York, with his attorney, Mr. Martini; after preliminary discussions, Marino and his attorney left.

Marino learned of his Indictment by reading a newspaper account, in February 1986 (almost five (5) years to the day subsequent to the incident in question); this was also the first time Marino learned of the immunity conferred upon his former law partner, Gulkin, five (5) years prior thereto.

PETITIONER'S DEFENSE

Mr. Angel, presently in the communications business, previously in metal (Gold) manufacturing for the dental trade, was the sole proprietor of Ora-Bright Products.

Mr. Angel, married, a father and grandfather, had no criminal record whatever.

Swersky had handled some civil matters for Ora-Bright Products, such as collections.

Mr. Angel categorically denied that Swersky was involved with him or his company in the purchase of gold or silver.

He denied knowing Sliker.

He denied any business deal with Sliker.

He denied authorizing Swersky to enter into any deal with Sliker.

Mr. Angel explained that 3,000 Krugerrands were worth about Two and One-Half of a Million ($2,500,000.00) Dollars in 1980; the largest metal deal either he or his company transacted amounted to twenty-five (25) krugerrands.

Neither he personally nor his company Ora Bright Pro-

ducts had accounts at the Republic National Bank, in New York where the Swersky-Sliker gold transaction took place.

His bank and Ora Bright's Bank was First National Bank and Midland Bank, located in Rahway, New Jersey which was the location of his office and manufacturing plant.

The Government waived cross-examination of this witness.

Mr. Andrew Macera, an electrical contractor, knew Marino for approximately sixteen (16) years, as a friend and an attorney.

He attested to Marino's reputation for honesty, truthfulness and decency within both the social and professional communities as being of the highest caliber.

Mr. Confrancesco, a real estate developer, knew Marino, as a friend and as an attorney, for approximately three and one-half (3½) years.

The community reputation of Marino as well as his own personal opinion concerning the characteristic traits of honesty, decency and truthfulness was "Class A."

It was his opinion that Marino would not be involved in illegalities.

Mr. Fried, a CPA dealing in real estate tax shelters, a friend and former client, knew Marino was indicted and on trial for conspiracy and possession of stolen bonds.

Knowing him for approximately nine (9) years he attested to Marino's reputation in both the social and professional communities as being excellent.

Based upon his knowledge of Marino, he claimed that it would be inconceivable that Marino would be involved in the commission of any crimes.

Mr. Gulka, President of First Monmouth Security, a Bond firm in Shrewsbury, New Jersey, having been associated in the security business for approximately eleven (11) years totally corroborated the fact that Marino, in early February 1981, had called him to verify both the Fort Meyer Bonds and Federal Home Loan

Bonds; he was able to authenticate the validity of the Fort Meyer Bonds through his own office; while Joseph Riggoloso, of Paine Webber, authenticated the validity of the Federal Home Loan Bonds for Marino.

Mr. Martini, an attorney, who originally represented Marino, explained that he and his client, along with Gulkin and his attorney, attended a conference with the U.S. Attorney's Office in February 1981 concerning the instant matter. He had no further contact with the Government until five (5) years later when Marino was indicted.

Mr. Martini had been a member of the Bar since 1972; he was the law clerk of Judge Joseph P. Harrahan, Hudson County Assignment Judge of the Superior Court of New Jersey; he was an assistant prosecutor with the Hudson County Prosecutors Office and eventually became an Assistant U.S. Attorney for the District of New Jersey, Newark Division for three years, thereafter entering private practice.

Mr. Martini put the lie to Swersky. He unequivocably described, in detail, the meeting in New York, with Marino, John Corbo and Swersky, at Swersky's office; a bribe offer was made in the sum of twenty-five thousand ($25,000.00) dollars by Swersky and Corbo, which was rejected by both himself and Marino.

Mr. Marino testified on his own behalf: He was married with two minor children and had been practicing law since 1966.

His testimony along with his character witnesses, demonstrated the lack of any predisposition to violate the law. He had no prior conflict with law enforcement nor had he been subject to any prior disciplinary proceedings while a member of the bar.

He admitted knowing Sliker, becoming his victim and accepting the bonds for transfer to reduce the One-Hundred and Ten Thousand ($110,000.00) Dollar debt.

He admitted being lured by Swersky and passing the bonds.

He explained the transactions as he understood them.

He denied actually knowing the bonds were stolen; this facet was corroborated by the tapes, and Swersky's cross-examination.

Marino was cross-examined but not impeached.

"THE SERPENT BEGUILED ME"

Morton Swersky, a disbarred lawyer, and convicted felon, became an "informant-agent" for the F.B.I. in November or December 1980, in an attempt to "work-off" a pending criminal case involving his own theft of Four-Hundred Thousand ($400,000.00) Dollars worth of stolen bonds. These charges were eventually dismissed for having "made" two causes for the Government, one of which was the matter at bar.

In November or December 1980, contemporaneously with his becoming an informer-agent for the F.B.I., Swersky was introduced to Marino by Peter North.

Swersky solicited defendant Marino, testifying:

> "I had told Marino that I was interested in buying deep discount bonds at a very cheap price as long as they were usable, as long as they had not been reported missing or anything. And he said he was going to see what he could do."

There were discussions in this first meeting proposed and designed by Swersky to instill confidence in Marino.

Swersky told the F.B.I. "I've got a live one" and part of the future conversations were tape recorded; Swersky's principle concern was getting Marino involved so that he (Swersky) could get his pending cases dismissed.

In order to accomplish his goal, Swersky admittedly cajoled, baited, enticed and lured Marino; he did this continuously, misrepresenting and using deceit and ruse.

When conversations were being recorded, Swersky lead and baited Marino; when the conversations were not being recorded, Swersky, also lured and falsely encouraged Marino.

Swersky claimed to be controlled and directed in his

actions by the F.B.I.; he therefore tried to control the conversations with Marino, program the language and obtain incriminating statements.

To further the enticement, Swersky gave meaningless documents to Marino and had conversations with him about them; this was a continuation of the ruse.

The luring, soliciting, beguiling and entrapping continued throughout.

Swersky admitted that Marino never acknowledged that he was dealing in stolen bonds.

The F.B.I. wanted to find the source of the stolen bonds and therefore it was necessary to propose a fictitious "legitimate" deal. If Marino knew the bonds were stolen, there would have been no consumated transaction. In pertinent part, Swersky was compelled to admit:

"Q. Wait a second, wait a second. You're asking Nick Marino to represent to you these are good bonds, these are genuine, these are not xeroxed copies, these are not stolen, these are not on the missing list. Isn't that what you're asking him?

"A. I'm asking him to assure me they're genuine, they're really real, they're not copies and no bonds are reported stolen yet.

The Court questioned Swersky about this aspect:

"THE COURT: Was there any discussion at that meeting that you say you had with Mr. Marino concerning whether these bonds had been stolen or not?

THE WITNESS: Yes, sir, I asked him whether these bonds were still good, whether they had been reported on any hospital sheets or anything. And he swore to me they were good and the rest of the bonds he was going to give me were going to be good and he guaranteed because I told him if we found out they weren't any good I didn't want them and please don't waste my time."

Even the tape recordings corroborated the proposal by Swersky of a genuine deal.

Swersky emphatically denied knowing Sliker, dealing

with him or ever meeting him. He explained that the letter on his attorney's stationery, as attorney for Ralph Angel, had been written several times for Ora-Bright; the letter to Sliker was written at his client's request and he knew nothing else about the transaction.

Swersky further denied ever meeting with Marino at his office after February 13th, 1981 and denied meeting with William Martini and Marino with his own Attorney John Corbo, in New York. He denied the bribery solicitation.

SPECIFIC STATEMENT OF FACTS RELATED TO THE INCIDENT OF EXTRANEOUS INFLUENCE OF THE JURY

On or about October 24, 1986, (subsequent to the conviction and before sentencing) juror number nine, Vincenza Traina, sent a letter to the District Court, stating that another juror, Anthony Ferrara, "brought some information into the jury room that may not have been appropriate." Specifically, Traina stated that Ferrara, an employee of the Republic National Bank, commented to her during the trial that the F.B.I. had subpoenaed records from Republic National Bank of a company called Ora-Bright, owned by the defense witness, Ralph Angel. Mr. Angel had testified that neither he nor his company had any account at Republic. The Government had waived all cross-examination of Mr. Angel.

Marino moved for a new trial. On January 12, 1987, and February 10, 1987, the District Court held evidentiary hearings to explore the allegations. The Court examined all 14 jurors including the alternates, F.B.I. Special Agent Edward Kelly, who served the subpoena, and Joseph Patrick, the warehouse supervisor from Republic National Bank in New York.

After examining the fourteen (14) jurors it was determined that four (4) heard none of Mr. Ferrara's statements. Five (5) jurors remembered vaguely that something was stated by Mr. Ferrara concerning a subpoena. Four (4) jurors, Melodie Crump, Janine Amato,

Barbara Blair, and Enza Traina, heard Mr. Ferrara's entire expose.

Basically, the four (4) jurors who heard the extraneous evidence, all describe Mr. Ferrara's account in which he explained Ora-Bright records existed at Republic National Bank in apparent contradiction of Mr. Ralph Angel's testimony that Ora-Bright had no bank account at Republic.

Mr. Ferrara's evidence was met by the jurors with explanations of surprise. Mr. Ferrara confirmed that he had seen the records himself.

This extraneous evidence contradicted the testimony of Mr. Angel who was not cross-examined by the Government.

REASONS FOR GRANTING REVIEW

POINT I

THIS COURT SHOULD GRANT CERTIORARI AS THIS CASE PRESENTS IMPORTANT CONSTITUTIONAL ISSUES CONCERNING THE RIGHT OF THE PETITIONER TO HAVE HAD HIS DEFENSE OF ENTRAPMENT PRESENTED TO THE PETIT JURY. THE TRIAL COURT'S REFUSAL TO CHARGE THE DEFENSE OF ENTRAPMENT VIOLATED THE PETITIONER'S FIFTH AMENDMENT RIGHTS. THE CONFLICTS IN THE CIRCUITS RESULTS IN DIFFERING APPLICATIONS OF THE ENTRAPMENT DEFENSE FROM CIRCUIT TO CIRCUIT.

I. In the case at bar, although the petitioner presented evidence of the Government initiation and solicitation, lack of propensity and disposition to violate the law, and admitted all the acts underlying the charges against him, he did deny the requisent element of criminal intent. The trial court, none-the-less, refused to charge the Petit Jury with the defense of entrapment.

The entrapment defense is premised upon "the notion that Congress could not have intended criminal punish-

ment for a defendant who has committed all the elements of a prescribed offense but was induced to commit them by the government." *United States v. Russell,* 411 U.S. 423, 435 (1973). Nothing in this Court's history of the defense, however, requires a defendant to admit that he committed all the elements of a prescribed offense before he may claim that he was induced to commit them by the government, as the Third Circuit Court of Appeals required Marino to do in the instant case. On the contrary, *Sorrells v. United States,* 287 U.S. 435 (1932), expressly permits a defendant to plead not guilty and assert the entrapment defense. See *Sherman v. United States,* 356 U.S. 373 (1958).

Sometimes the defense does not have a constitutional basis, although in a particular case the law enforcement conduct in question may violate "the fundamental fairness, shocking to the universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment." *Id.* at 431-32 (quoting *Kinsella v. United States ex rel. Singleton,* 361 U.S. 234, 246 (1960)). See Note, Pleading the Entrapment Defense: The Propriety of Inconsistency, 28 N.Y.L. Sch. L. Rev. 1025, 1033 n. 53 (1983).

Constitutional implications nevertheless arise when, as in the instant case, courts restrict the use of the entrapment defense to cases where the defendant admits all elements of the crime charged, including mens rea. See *United States v. Mathews,* 803 F.2d 325, 327 (7th Cir. 1986); *United States v. Prickett,* 790 F.2d 35, 36 (6th Cir. 1986); *United States v. Mora,* 768 F.2d 1197, 1198-99 (10th Cir. 1985) (per curiam), cert. denied, 106 S. Ct. 856 (1986); *United States v. Hill,* 655 F.2d 512, 514 (3d Cir. 1981). Requiring a defendant to admit guilt before he may claim the defense infringes upon the defendant's constitutional right to require the government to prove each and every element of its case beyond a reasonable doubt. E.g., *United Sates v. Demma,* 523 F.2d 981, 986 (9th Cir. 1975) (en banc). In effect, he must incriminate himself before he can assert the defense.

Over the past fifty-five years, this Court has focused upon "the intent or predisposition of the defendant to commit the crime". Russell, 411 U.S. at 429. See also Hampston v. United States, 425 U.S. 484, 488-89 (1976); Sherman v. United States, 356 U.S. at 372; Sorrells v. United States, 287 U.S. at 442 (1932). As now-Chief Justice Rehnquist noted in Russel, "(i)t is only when the governments deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." Russell, 411 U.S. at 436. In determining whether a particular defendant was predisposed to commit the offense charged, the crucial question is "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials". Sorrells, 287 U.S. at 451. See also Sherman, 356 U.S. at 372.

In the instant case, Marino fully admitted possessing and transfering the bonds, but denied the intent to commit a crime in that he was led to believe that the bonds were legitimate and that the Government agent (Swersky) would only buy legitimate bonds. Thus, he admitted doing all of the acts constituting the offense, but denied having the mens rea necessary to convert otherwise innocent conduct into a criminal offense.

The Third Circuit's current possition directly conflicts with the Supreme Court's view that there is no inconsistency in joining an entrapment plea with a not guilty plea. Sorrells, 287 U.S. at 452. Certainly if a defendant simply pleads not guilty, he is not admitting even as much as Marino did. Under Sorrells and its progeny, as well as under the fifth amendment's protections, the Third Circuit's rule requires the defendant to relinquish a constitutional right as a condition precedent to use of the entrapment defense.

In Simmons v. United States, 390 U.S. 377 (1968), this Court dealt with the "intolerable" situation of a defendant having to surrender a constitutional right in order to assert another. Id. at 393-94. That case involved a defendant's need to incriminate himself by admitting owership of incriminating evidence in order to obtain standing to challenge an illegal search. Although the entrapment defense does not yet rise to the level of an absolute constitutional right, the Simmons holding nevertheless can be applied to the fifth amendment protections that Marino had to sacrifice in order to claim the entrapment defense. Indeed,". . . .Simmons may be read as forbidding a forced trade-off of protection, even if one right is not constitutionally grounded, as long as that right remains fundamentally important."

Marino should not be precluded from asserting the entrapment defense solely because he exercises his fifth amendment and due process rights. In Griffin v. United States, 380 U.S. 609 (1965), this Court prohibited prosecutors from commenting upon defendants' failure to testify, thereby penalizing defendants who exercised their right to remain silent. The exercise of a constitutional right should not be costly to a defendant, Id. at 614. Thus, penalizing a defendant who exercises his fifth amendment and due process rights by precluding him from exercising the important right to present all reasonable defenses is impermissible.

The oft-discussed concerns about inconsistent defenses and about predisposition are not at issue in this case. Even if they were, they would pale in light of the constitutional implications of denying a criminal defendant use of a defense unless he first incriminates himself by admitting that he committed a crime. "Whether the defendant had the criminal intent required for conviction is a jury issue. Whether he was predisposed to commit the

charged crime . . . .is also a jury issue." United States v. Henry, 749 F.2d 203, 213 (5th Cir. 1984) (en banc).

Marino should be allowed to present both his lack of intent and his lack of predisposition to the jury and allow the jury to decide the issues. The consistency or inconsistency of particular defenses are a factor for the jury to consider in assessing the defendant's credibility. As the Demma, supra, court noted, "inconsistent testimony by the defendant seriously impairs and potentially destroys his credibility." Demma, 523 F.2d at 985. Conversely, a defendant who elects not to testify may reduce his chances of success in persuading a jury that he was entrapped, but "that is a choice that he has a right to make free of any compulsion whatsoever." United States v. Annese, 631 F.2d 1041, 1047 (1st Cir. 1980).

The Conflict In The Circuits Results In Differing Applications Of The Entrapment Defense From Circuit To Circuit.

The circuits are sharply divided on whether a defendant can claim entrapment while denying scienter. As a consequence, a federal defendant in New Jersey, such as Marino, is treated differently from a similarly charged defendant in New York or Texas with regard to his ability to claim entrapment while exercising his constitutional rights. Two circuits allow a defendant to deny all elements of the crime, including physical acts and intent, and still claim entrapment. Four circuits allow the entrapment defense where, as in the instant case, the defendant admits committing the acts charged but denies possessing the requisite mens rea. Five circuits now require the defendant to admit all elements, including intent. One circuit requires the defendant to admit the acts involved in the offense, but has never clearly addressed the intent issue. Ware v. United States, 259 F.2d 442, 445 (8th Cir. 1958).

A defendant in the District of Columbia may deny intent but still claim entrapment. In United States v. Kelly, 748 F.2d 691 (D.C. Cir. 1984), an ABSCAM case, the District of Columbia Circuit Court of Appeals held that the entrapment instruction was properly given where the defendant testified that he took a bribe, but claimed he did so to further an investigation and therefore lacked the necessary criminal intent. Id. at 696, 701 n.24. In its leading case on the entrapment issue, however, the District of Columbia Circuit did not require the defendant to admit any elements of the offense charged, and allowed the defendant to use "alternative but not inconsistent" defenses. Hansford v. United States, 303 F.2d 219, 221 (D.C. Cir. 1962) (en banc). The Hansford court held that "it was consistent with defendant's denial of the transaction to urge that if the jury believed it did occur the government's evidence as to how it occurred indicated entrapment." Id. See Kelly, 748 F.2d at 701 n.24.

If a defendant in the Fifth Circuit admits the acts charged but presents evidence negating his criminal intent, he is entitled to an entrapment instruction. United States v. Henry, 749 F.2d 203, 205-06 (5th Cir. 1984) (en banc). As did Marino, the defendant in that case testified and admitted the acts but denied possessing the requisite scienter. Id. at 206. The Fifth Circuit concluded that "a non-testifying defendant may - by examination of witnesses and argument - contest every element of the charged offense and still request and obtain an entrapment instruction." Id. at 210. When the defendant testifies, however, the same rule applies because it "is entirely consistent with the nature of the jury function and with the nature of the entrapment defense to require the jury to consider both the existence and the quality of the defendant's alleged intent". Id. at 211.

The Fifth Circuit took the approach that the accused is not guilty if he was not predisposed to commit the crime, rather than the approach that he is guilty of the crime but can avoid punishment because the government entrapped him. Id. at 210. In so doing, the Fifth Circuit aligned itself with this Court's long line of cases cited earlier.

While there is some confusion in the First Circuit arising from United States v. Caron, 588 F.2d 851, 852, (1st Cir. 1978) in United States v. Annese, 631 F.2d 1041 (1st Cir. 1980), however, the court held that a testifying defendant must admit the acts, need not admit his guilt as to the offense, but cannot actually deny his guilt. Id. at 1046. In holding that a non-testifying defendant may claim the entrapment defense, the court held that the defendant must choose whether to testify "free of any compulsion whatsoever. To hold otherwise would raise a serious fifth amendment problem." Id. at 1047.

In a slightly different approach, the Second Circuit Court of Appeals allows a defendant to claim entrapment while contending that his acts did not violate the law, as long as he does not take the stand. United States v. Silvestri, 719 F.2d 577, 580 n.1 (2d Cir. 1983). He need not admit the alleged criminal acts as long as he does not deny them. United States v. Valencia, 645 F. 2d 1158 (2d Cir. 1980).

Generally, a defendant in the Eleventh Circuit may not use the entrapment defense if it conflicts with another defense theory, although certain exceptions exist. An entrapment defense is allowed in conjunction with a not guilty plea as long as the defenses are not so inconsistent as to confuse the jury. United States v. Walker, 720 F.2d 1527, 1534 (11th Cir. 1983), cert, denied, 465 U.S. 1108 (1984). As long as such seemingly inconsistent defenses are not "impermissibly inconsistent" - that is, they do not disprove each other - they are allowed. United States v. Smith, 757 F.2d 1161, 1168-69 (11th Cir. 1985).

A defendant in the Ninth Circuit enjoys the broadest range of defense opportunities with regard to this issue. In United States v. Demma, 523 F.2d 981 (9th Cir. 1975) (en banc), the Ninth Circuit Court of Appeals developed what are still the strongest arguments in favor of the "permissive" approach to the entrapment debate. Nagle, inconsistent Defenses in Criminal Cases, 92 Mil. L. Rev. 77, 106-09 (1981). Demma, supra, permits a defendant to deny committing any element of the crime, including intent, and yet claim entrapment. Id. at 983. Both defendants in Demma testified that they did the acts, but denied that they possessed the scienter necessary to convert their conduct into criminal activity. Id. at 982. Basing its rationale upon Sorrells, the Demma court held that "the requirement that the defendant concede a state of mind is in direct conflict with the Sorrells conception of entrapment." Demma, 523 F.2d at 983. Thus, the Ninth Circuit permits totally inconsistent defenses on the premise that a defendant's assertion of entrapment while he simultaneously denies committing the acts constituting the offense simply raises a credibility question for the jury. Id. at 985

At the opposite end of the entrapment spectrum are the Third, Fourth, Sixth, Seventh and Tenth Circuits, which require the defendant to admit every element of the offense, including mens rea, before he can claim that he was entrapped. Crisp v. United States, 262 F.2d 68, 70 (4th Cir. 1958). However, the Fourth Circuit rejected the Crisp's reasoning and held that the defendant must concede that he committed the crime in question before he can claim that he was entrapped into doing so. U.S. vs. Dorta, 783 F.2d at 1181-82. But the precise issue before this Court was not addressed. It is not clear whether a defendant in the Fourth Circuit can admit only the acts and still avail himself of the entrapment defense.

Perhaps the easiest explanation for the diverse holdings in the various circuits is that a number of circuits have mistakenly relied upon the concurring opinion in Sorrells. In his concurrence in Sorrells, Justice Roberts noted that a defendant who commits a crime, albeit due to government inducement, is within the letter of the law proscribing the criminal conduct and is therefore "amenable to its penalties." Sorrells, 287 U.S. at 456 (Roberts, J., concurring). According to Justice Roberts the Entrapment defense does not excuse the criminal conduct or somehow render the statute in question inapplicable to that defendant. Id. at 455-56. Nor does it entitle the defendant to "a double defense under his plea of not quilty, namely, (a) that what he did does not fall within the definition of the statute, and (b) entrapment." Id. at 456.

The Sorrells majority however, expressly considered and rejected the government's contention that the entrapment defense was not available to a defendant who pleads not quilty. Id. at 452. Thus, from Sorrells forward, this Court has allowed defendants to plead not guilty and still claim the entrapment defense. As the Ninth Circuit noted, "the requirement that the defendant concede a state of mind is in direct conflict with the Sorrells conception of entrapment." Demma, supra, 523 F.2d at 983. On that basis alone, the district court's refusal to allow Marino to claim entrapment is contrary to the law of the land, and reversal is mandated.

Thus, the five circuits still refusing to allow a defendant to claim entrapment unless he admits all elements of the offense are simply perpetuating the theoretically and constitutionally infirm U.S. v. Eastman, 212 F.2nd 370 (9th Cir. 1954) principles which were soundly rejected in Demma. Although some of the cases address concerns with predisposition determinations and analyses of whether a given set of defenses is impermissibly inconsis-

tent, their original fundamental basis remains in the Eastman rule.

Six years ago, one commentator expressed great concern about the "serious split among the circuits. . . .on a fundamental right of any defendant - the right to present evidence." Nagle, supra p. 19 at 125. He concluded:

> "It is a fundamental flaw in the American system of justice if an individual arrested in San Francisco in the Ninth Circuit can assert entrapment while still putting the Government to its proof, while a defendant arrested in Chicago in the Seventh Circuit for the same offense or even as part of the same conspiracy can assert entrapment only at the expense of his constitutional rights. Such a dichotomy cries out for correction."

POINT II - THIS COURT SHOULD GRANT CERTIORARI AS THIS CASE PRESENTS IMPORTANT ISSUES CONCERNING THE PETITIONER'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL, RIGHT OF CONFRONTATION, RIGHT TO COUNSEL AND DUE PROCESS: EXTRANEOUS AND EXTRAJUDICIAL EVIDENCE CAME BEFORE THE PETIT JURY, AND THEREBY UNDERMINED THE TENET OF A FAIR TRIAL: PETITIONER WAS DENIED THE OPPORTUNITY TO CONFRONT THIS EXTRANEOUS EVIDENCE AND RESTORE THE IRREPUTABLE DAMAGE TO HIS CASE.

At the District Court level the Government did not dispute the conclusion reached by the District Court Judge after a full and complete evidentiary hearing that the Petit Jury was in fact presented with extra-record and ex-

traneous facts, related to an issue in the case at bar, mainly the credibility of Mr. RALPH ANGEL, a defense witness whom the Government deliberately never cross-examined.

The Government also did not attempt to rebut the prima facie violation of the Petitioner's Sixth Amendment Rights; the trial court found as a matter of law and fact that extra-record influence present in this case constituted such a violation.

> "I find it to be clear from the facts recounted above that the Marino jury was presented with extra recorded facts which relate to an issue in the Marino case, namely the credibility of a defense witness whom the government never cross-examined. The government does not dispute this conclusion. I also find it clear that the defendant's sixth amendment rights were violated. As a matter of law, extra-record influence of the type present in this case constitutes a prima facie violation of the defendant's sixth amendment rights." (citations omitted) The government did not attempt to rebut this prima facie violation nor could it, since a matter of fact, I find it to be clear that defendant's rights were infringed. Mr. Ferrara and the other four jurors who heard his full story all understood the extra-record facts made known to him as evidence that Mr. Angel's testimony regarding Ora-Bright's bank accounts at Republic were inaccurate or untrue." (Appendix A annexed)

When the extraneous material about Mr. Angel "having an account at Republic National Bank" came improperly before the jury, it was tantamount to the Government having impeached this witness' testimony behind closed doors without the defense's knowledge and without the defense having an opportunity to meet this impeachment.

The trial court clearly recognized how severely disadvantaged the defendant Marino was, holding:

> "Had the fact that Republic kept records on Ora-Bright been presented to the jury in open court, defendant's counsel could have used procedures known to trained counsel to examine the record and prove that they sup-

ported, rather than refuted Mr. Angel's testimony. Thus, defendant could have buttressed Mr. Angel's credibility and thereby buttressed Defendant's general effort to impeach Mr. Swersky's credibility. Because the facts were presented off the record, however, defendant's capacity to benefit from the assistance of counsel, the confrontation of witnesses, and the impartiality of the Jury was as a matter of fact impaired." (Appendix A Annexed).

This type of juror misconduct has a high potential of prejudice, and it must be considered "prima facie" prejudicial against the Petitioner with the onus upon the Government to disprove the presumed prejudice (*Government of Virgin Islands v. Gereau,* 523 F.2d 140; *Johnson v. U.S.,* 207 F.2d 314).

This record is barren of any proof by the government assuaging the prejudice to the Petitioner.

The introduction of this extraneous material into the jury room undermined the fundamental tenet of a fair trial, affording no protection of Petitioner Marino's right of confrontation and of counsel, and deprived him of advancing reasonable arguments to the jury. These basic guarantees of constitutional dimension have all been subverted.

This Court, in the matter of *Turner v. Louisiana,* (379 U.S. 466) put it quite succinctly; at page 472, 473, stating:

"The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. . . .

In the Constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the evidence developed against a defendant shall come from the witness stand, in a public courtroom where there is full judicial protection of the defendant's right of controntation, of cross-examination, and of counsel. What happened in this case operated to subvert these basic guarantees of trial by jury."

Turner, supra, cited with approval, in Government of *Virgin Islands v. Gereau, supra,* at page 151 stated:

> ". . . where jurors consider evidence, in the form of either fact or opinion, which has not been introduced in Court, the confrontation and counsel rights of an accused are obviated as regards to the particular evidence received."

In *Parker v. Gladden,* (385 U.S. 363), this Court held that a mere statement by the bailiff having custody of the jury to only one juror that the defendant was "wicked" and "guilty," constituted a violation of Defendant's Sixth Amendment Rights to confrontation and to an impartial jury.

In a less compelling situation than the case at bar, in *U.S. v. Allsup,* (566 F.2d 68, 9th Cir.), the Court held that the defendant was entitled to a new trial where the trial court denied disqualification of two jurors' promise to act impartially. The Court reasoned that the jurors' mere positions with the bank, albeit, different branches, was sufficient to cast dispersion on their promise to act impartially.

In *U.S. v. Greer,* (620 F.2d 1383, 10th Cir.), the Court reversed a drug conviction merely because of "lunch break conversations" between jurors and U.S. Marshalls concerning possible sentencing procedures.

In *Marshall v. U.S.,* (360 U.S. 310) at page 312, the Court stated:

> ". . . The prejudice to the defendant is almost certain to be as great when (prejudicial) evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. . . . It may indeed be greater for it is not then tempered by protective procedures."

In the case at bar, since there was no cross-examination of and no impeachment of the witness, Ralph Angel, in open court, the prejudice to the Petitioner Marino was exacerbated, when the impeachment of his principle witness, Mr. Angel, occurred in the jury room, without the benefits of judicially protected procedures.

In *U.S. v. Kum Seng Seo* (300 F.2d 623, 1962, 3rd Cir.), a new trial was granted as a result of a prejudicial newspaper article being exhibited by a juror in the jury room. At page 625, the Court stated:

> "Traditionally this court has taken the position, even in civil cases that verdicts would be set aside where there was evidence that the impartiallity of the tribunal had been affected or that tainted material had come before a jury. See *McKibben v. Philadelphia & Reading Railway Co.*, 251 F.577 (3rd Cir., 1918). In criminal cases our rule has been strict. See *Griffin v. United States*, 295 F. 437 (3rd Cir., 1924). The rule of other courts of appeals has been equally so. See *Briggs v. United States*, 221 F.2d 636 (6th Cir., 1955). But whatever may have been the law prior to Marshall, since that decision it has been clear that a new trial should be granted in federal criminal cases when it is shown that members of the jury have read news accounts containing inadmissible and inaccurate facts prejudicial to the defendant."

In *Gibson v. Clanon*, (633 F.2d 851) in concluding that there was a reasonable possibility that the extrinsic evidence affected the verdict and granting the Writ of Habeas Corpus, the Court, at page 854, made compelling findings:

> ". . . These decisions have noted that when a jury considers facts that have not been introduced in evidence, a defendant has effectively lost the rights of confrontation, cross-examination, and the assistance of counsel with regard to jury consideration of the extraneous evidence. In one sense the violation may be more serious than where these rights are denied at some other stage of the proceedings because the defendant may have no idea what new evidence has been considered. It is impossible to offer evidence to rebut it, to offer a curative instruction, to discuss its significance in argument to the jury, or to take other tactical steps that might ameliorate its impact."

It is precisely this type of prejudice that innured to the

APPENDIX A—TRIAL COURT DECISION 4/22/87

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CRIMINAL ACTION NO. 86-36

UNITED STATES OF AMERICA,

v.

NICHOLAS MARINO, et al.,

Defendants.

Samuel Alito, Esq.
United States Attorney
by: Daniel J. Gibbons, Esq.
Asst. United States Attorney
970 Broad Street
Newark, New Jersey 07102

Michael S. Washor, Esq.
Washor, Greenberg & Washor
291 Broadway
New York, New York 10007
Attorneys for Defendant Marino

OPINION

ACKERMAN, District Judge.

This is a criminal action brought by the United States Government against defendant Nicholas Marino and others, alleging violations of federal criminal prohibitions against interstate dealings in stolen securities. Before me now are defendant Marino's motions for post-conviction relief.

In September and October, 1986, Marino was tried before a jury in this court on two counts of dealing in and one count of conspiring to deal in stolen bearer bonds moving in interstate commerce, in violation of 18 U.S.C.

§§2315, 2 and 371. Chief among the government's evidence offered against defendant Marino was the testimony of John Sliker and Morton Swirsky, who both claimed to have participated in the bond transactions upon which the charges against defendant Marino were based. The evidence presented by defendant Marino included the testimony of Roger Angel, which in part contradicted the testimony of Morton Swirsky. Defendant Marino also took the stand in his own defense. After the close of evidence, I instructed the jury regarding the law applicable to the crimes charged and the rules governing deliberations. I instructed the jury in part that defendant's guilt or innocence "must be established only by the evidence before you." On October 2, 1986, defendant was convicted by the jury on Count I of the indictment, which stated the conspiracy charge, and Count III of the indictment, which stated one of the two charges of dealing in stolen bearer bonds. Defendant was acquitted on Count II, the other charge of dealing in stolen bearer bonds.

Defendant has moved for arrest of judgment, relief from the verdict, and a new trial, on the following grounds: that the court lacked jurisdiction over the matter, that the verdict was against the weight of evidence, that no crimes were committed, that the verdict was contrary to law, that the interest of justice demands a new trial, and that the jury was prejudiced against defendant by juror misconduct and extraneous influence. I shall consider each of these grounds in turn.

In his conviction on Counts I and III of the indictment, defendant was found guilty of violating three federal statutes, 18 U.S.C. §§2315, 2 and 371, by conspiring to deal and dealing in stolen bearer bonds moving in interstate commerce, within the District of New Jersey and elsewhere. Because the offenses are federal criminal of-

fenses whose commission occurred at least in part in this district, this court has jurisdiction over the matter. *See* 18 U.S.C. §§3231, 3237; Fed.R.Crim.P. 18.

When a defendant asserts that his conviction is against the weight of evidence, the court must sustain the conviction if "there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. U.S.*, 315 U.S. 60, 80 (1942) (quoted in, e.g., *U.S. v. Provenzano*, 334 F.2d 678, 683-84 (3d Cir. 1964)). I find that when the evidence in this case is viewed most favorably to the Government, there is more than substantial evidence to support a guilty verdict against defendant.

Defendant's assertion that no crimes were committed may be reduced to two claims, that conviction was against the weight of evidence or that errors in the proceedings require relief from the verdict. I have already found that the evidence in this case supported a guilty verdict against defendant. I shall consider defendant's more specific claims of legal error below.

Defendant's final grounds for relief, that the verdict was contrary to law, that the interest of justice demands a new trial, and that the jury was prejudiced against defendant by juror misconduct and extraneous influence, are all based on the following more specific contentions: that the court committed an error of law when it refused to instruct the jury on the law of entrapment; that the court committed errors of law in regard to each of defendant's pre-trial motions, request to charge the jury, and exceptions to the jury charge which the court denied; and that the jury received extra-record facts in this case in violation of defendant's sixth amendment rights and to defendant's prejudice. I shall discuss each of these three contentions in turn.

In order to assert a defense of entrapment in this circuit, a defendant must first admit his "guilt of the crime charged and all of its elements, including the required mental state." *U.S. v. Hill,* 655 F.2d 512, 514 (3d Cir. 1981) (citing *U.S. v. Watson,* 489 F.2d 504 (3d Cir. 1973)), *cert. denied,* 464 U.S. 1039 (1984). *See Government of the Virgin Islands v. Braithewaite,* 782 F.2d 399 (3d Cir. 1986). The Third Circuit has specifically rejected the alternative view that an entrapment charge may be given once a defendant admits only the "operative facts" of the charge, and not each element specifically, including the requisite mental state. *U.S. v. Janotti,* 673 F.2d 578, 601 (3d Cir. 1982). Defendant Marino never did admit the mental states with which he was charged under any of the three counts in the indictment, including the two counts on which he was convicted, Counts I and III. Therefore, his request for an entrapment charge was properly denied at the time it was made, and does not at this time constitute an error of law requiring relief from the jury verdict.

In challenging the remaining decisions of the court in which pre-trial motions, requests to charge the jury, and exceptions to the charge were offered by defendant and denied, defendant states only that he renews his original motions, requests, and exceptions. Without more specific argument from defendant based on the facts found and law applied in each of those separate decisions, I see no need to reconsider them.

I now come to defendant's allegations of juror misconduct and extraneous influence on the jury. These allegations are based on two letters written by juror number 9, Vincenza Traina, after the jury announced its verdict and was dismissed. The first letter, written some time after October 2, 1986 and mailed to Mr. Washor, defendant's counsel, recounted Ms. Traina's belief that

she had been unduly pressured by her fellow jurors to vote for a verdict of guilty against defendant. I find, and the parties agree, that any inquiry into the dynamics of jury deliberation is prohibited, and that this letter of Ms. Traina's can provide no basis for questioning the jury's verdict. *See Government of the Virgin Islands v. Gereau,* 523 F.2d 140, 149-50 (3d Cir. 1975), *cert. denied,* 424 U.S. 917 (1976). *Accord, Van Buskirk v. Carey Canadian Mines, Ltd.,* 760 F.2d 481 (3d Cir. 1985); *Government of the Virgin Islands v. Nicholas, 759 F.2d 1073 (3d Cir. 1985); U.S. v. Aimone,* 715 F.2d 822 (3d Cir. 1983); *see also* Fed.R.Evid. 606(b).

Ms. Traina's second letter requires more consideration. On or about October 24, 1986, Ms. Traina wrote directly to the court, stating in part:

> Dear Judge Ackerman:
>
> I hope you'll excuse this second intrusion on your time, but I've remembered something that occurred during the trial. One of the jurors, Anthony Ferrara, brought some information into the jury room that may not have been appropriate.
>
> Mr. Ferrara is employed by the Republic Bank. One morning he commented on something he learned at work the previous evening. He said that the F.B.I. had subpoenaed the bank's records for a defunct account in the name of Orabrite. This was a few days after we had heard testimony concerning a company with the name of Orabrite, and where they had bank accounts.
>
> I'm sorry that I didn't bring this to your attention sooner, but as I said before, I had forgotten about it. At the time, I felt that it was inappropriate, but we were not all assembled so I dismissed it.

It is the law of this Circuit that "extraneous influence" imposed upon a jury, including "consideration

by the jury of extra-record facts about the case" may sufficiently prejudice the decision making of a jury to warrant the setting aside of its verdict. *Gereau,* 523 F.2d at 149-50, 154. The consideration by the jury of extra-record facts is "*prima facie* incompatible" with a defendant's sixth amendment rights to an impartial jury, to confront witnesses, and to receive the assistance of counsel at every critical stage of a criminal proceeding. *Gereau,* 523 F.2d at 150. Therefore, once the jury's consideration of extra-record facts is established, and a resultant violation of the defendant's sixth amendment rights is established, the verdict must be set aside if a party has been prejudiced by that consideration. *Gereau,* 523 F.2d at 153-54.

In general, there is a presumption that jury verdicts are valid and free from prejudice. *Gereau,* 523 F.2d at 154. Certain instances of extraneous influence, however, establish a *prima facie* case of prejudice. For example, when an outsider communicates with a juror during a trial regarding the guilt or innocence of the defendant, there is presumptive prejudice. *U.S. v. Coleman,* 805 F.2d 474, 482 (3d Cir. 1986) (citing *Remmer v. U.S.,* 347 U.S. 227, 229 (1954)); *U.S. v. Boscia,* 573 F.2d 827, 830-31 (3d Cir. 1978) (quoting *Remmer,* 347 U.S. at 229-30). In such cases, the verdict must be set aside unless the opposing party rebuts the presumption of prejudice. *Gereau,* 523 F.2d at 154.

I note that the *Gereau* court, in canvassing the subject of undue influence on jury verdicts, made a categorical distinction between extra-record facts and outsider communications directly regarding the guilt or innocence of the defendant. 523 F.2d at 150-154. In addition, it appears that the Third Circuit has never expressly considered the circumstances under which extra-record facts, as opposed to outsider communication, may give rise to a presump-

tion of prejudice. Nevertheless, *Coleman* and *Boscia* clearly suggest that a presumption of prejudice should be inferred when the jury learns of extra-record facts which directly concern the guilt or innocence of the defendant.

The process by which the court considers the prejudicial effect of extra-record facts on the jury begins with an allegation that extra-record facts have reached the jurors. When there is "a significant possibility" that a juror has been exposed to prejudicial extra-record facts, the Third Circuit "prefers," in general, that the court investigate the possibility of exposure by conducting individual questioning of the jurors. *Government of the Virgin Islands v. Dowling,* Nos. 86-3289 and 86-3290 (3d Cir. March 19, 1987), slip op. at 6-7. *See* cases cited in *Dowling,* slip op. at 7. The court may exercise "wide discretion" in determining the questions to ask of jurors and the manner of asking them. *Dowling,* slip op. at 7-8. *See* cases cited at *Dowling,* slip op. at 8. It is well accepted for the judge to question jurors. *See U.S. v. Moten,* 582 F.2d 654, 667 (2nd Cir. 1978); Wright & Miller, *3 Federal Practice and Procedure* §554 at pages 261-62. *Compare Lanza v. Poretti,* 537 F.Supp. 777, 782 (E.D.Pa. 1982) (attorneys did questioning) and *U.S. v. Iezzi,* 451 F.Supp. 1027, 1038 (W.D.Pa. 1976) (judge questioned jurors *in camera,* with no objection from defendants), for an illustration of the breadth of the court's discretion to tailor the proceeding to the needs of the case.

Limits to the scope of juror questioning are set by Rule 606(b) of the Federal Rules of Evidence. That provision states:

(b) Inquiry into validity of verdict or indictment

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Within these limits, the court should attempt to establish with its questions: 1) what the extraneous influence was and 2) whether it was of a nature calculated to be prejudicial. *Liggett & Myers v. Imbraguglia,* 73 F.Supp. 909 (D.Md. 1947). The "entire picture" of the influence "should be explored." *Moten,* 582 F.2d at 667.

Based on the evidence adduced, the court must determine what, if any, extra-record "contamination" occurred and, if there was such contamination, whether it was sufficiently prejudicial to require that the verdict be overturned given a violation of the defendant's sixth amendment rights. Judgments regarding the prejudicial value of the extra-record influence are made by the judge objectively, since it is forbidden to probe whether the jurors were subjectively prejudiced. *Gereau,* 523 F.2d at 150-54; *Owen v. Duckworth,* 727 F.2d 643, 646 (7th Cir. 1984); *Musto,* 540 F.Supp. at 345. As is often said, the juror can testify to the existence and nature of the influence, but not its effect. *U.S. v. Greer,* 620 F.2d 1383, 1385 (10th Cir. 1980);

Lewellyn v. Stynchcome, 609 F.2d 194, 196 (5th Cir. 1980); *U.S. v. Jonnet,* 597 F.Supp. 999, 1001 (W.D.Pa. 1984). The question of effect is for the judge.

After reviewing the October 24 letter from Ms. Traina, the parties agreed that it raised a question of influence by extra-record facts. Both sides requested that the court hold a hearing to develop evidence on the scope of the influence and its prejudicial effect. On January 12, 1987 and February 10, 1987, the court held hearings to explore the issues. The court called all 14 jurors empanelled at the start of the trial and questioned them regarding juror Ferrara's alleged remarks. One of Mr. Ferrara's coworkers, Joseph Patrick, and special agent Edward Kelly of the F.B.I., who served the subpoena referred to by Mr. Ferrara, were also questioned. Based upon all the evidence adduced in this matter, I make the following findings of relevant fact.

The case against defendant Marino was based in large part on the testimony of two government witnesses, John Sliker and Martin Swirsky. During the course of the trial, defendant spent many hours cross-examining these witnesses, attempting to impign their credibility with evidence of prior bad acts, criminal convictions, and untrustworthy character, including evidence of past frauds and misstatements and evidence of cooperation with the government in anticipation of lenient treatment. At one point, defendant called Ralph Angel to testify that Martin Swirsky had lied when in the past Swirsky represented in a letter that Angel's company, Orabrite, was involved in a Kruggerand deal with John Sliker. According to the letter, the deal was to be handled through Orabrite's account at the Republic National Bank. In response to defendant's questioning, Mr. Angel not only testified that Swirsky's letter was false and unauthorized, but also that, while

Orabrite had bought Kruggerands from Republic National Bank, the company had no bank accounts with Republic. The government did not cross-examine Mr. Angel.

Apparently, however, the government did attempt to verify the accuracy of Mr. Angel's statement that Orabrite had no account at Republic. The prosecuting attorney, Mr. Gibbons, dispatched F.B.I. Special Agent Kelly to Republic's record storage center in Passaic, New Jersey, with a subpoena for any records Republic kept on Orabrite. Special Agent Kelly found records there which showed that Orabrite engaged in gold transactions with Republic. There was no evidence in Republic's records that Orabrite had any bank account with Republic. The government never attempted to offer any of this information into evidence.

One of the jurors sitting in the *Marino* case, Mr. Anthony Ferrara, worked for Republic at the Passaic records center, and was on leave from his job while serving on the *Marino* jury. The government did not know that one of the *Marino* jurors worked at the records center. One night soon after Special Agent Kelly made his trip to the records center, Mr. Ferrara dropped by his workplace. He was told that an F.B.I. agent named Kelly had come by with a subpoena for Orabrite records and had been surprised at the quantity of material he was shown. One or two days later, while waiting in the jury room for the resumption of that day's proceedings in the *Marino* trial, Mr. Ferrara spoke about what he had learned at work. In the presence of six to ten of his fellow jurors, Mr. Ferrara mentioned out loud that he had visited work and had learned that the F.B.I. had served a subpoena for Orabrite records and had been shown a quantity of papers in response. Mr. Ferrara expressed surprise that Orabrite records existed at the records center, for that fact seemed to contradict the

testimony of Mr. Angel earlier that Orabrite did not have a bank account at Republic.

Of the fourteen jurors and alternates, four heard none of this. Five jurors remembered only vaguely that something about a subpoena had been mentioned. Four jurors, Melodie Crump, Janine Amato, Barbara Blair, and Ms. Traina, heard Mr. Ferrara's story. They all described the story as one in which Mr. Ferrara explained that Orabrite records existed at Republic, in apparent contradiction of Mr. Angel's testimony that Orabrite had no account there.

Mr. Ferrara's story was met with vague exclamations of mild surprise, such as "you're kidding," by those who heard it. Mr. Ferrara confirmed that he had seen the records himself. The story was not discussed any further. It was never mentioned again.

I find it to be clear from the facts recounted above that the *Marino* jury was presented with extra-record facts which related to an issue in the *Marino* case, namely the credibility of a defense witness whom the government never cross-examined. The government does not dispute this conclusion. I also find it to be clear that defendant's sixth amendment rights were violated. As a matter of law, extra-record influence of the type present in this case constitutes a *prima facie* violation of defendant's sixth amendment rights. *Gereau,* 523 F.2d at 150. The government does not attempt to rebut this *prima facie* violation. Nor could it, since as a matter of fact, I find it to be clear that defendant's rights were infringed. Mr. Ferrara and the other four jurors who heard his full story all understood the extra-record facts made known to them as evidence that Mr. Angel's testimony regarding Orabrite bank accounts at Republic was inaccurate or untrue. In

fact, it was accurate. Orabrite never had a bank account at Republic. The records uncovered at the Republic records center showed only that Orabrite had engaged in gold transactions with Republic; a fact which Mr. Angel admitted in his testimony. Had the fact that Republic kept records on Orabrite been presented to the jury in open court, defendant's counsel could have used procedures known to trained counsel to examine the records and prove that they supported, rather than refuted, Mr. Angel's testimony. Thus, defendant could have buttressed Mr. Angel's credibility and thereby buttressed defendant's general effort to impeach Mr. Swirsky's credibility. Because the facts were presented off the record, however, defendant's capacity to benefit from the assistance of counsel, the confrontation of witnesses, and the impartiality of the jury was as a matter of fact impaired.

I conclude, however, that the infringement of defendant's sixth amendment rights did not prejudice the jury verdict against him. *See Gereau,* 523 F.2d at 153-54. The worst effet the extra-record facts could have wrought would have been that five jurors found Mr. Angel's testimony utterly unreliable or untrustworthy. Even in that extreme instance, I find that the jury would have reached the same verdict. The jurors were provided with an ample supply of evidence aside from Mr. Angel's testimony from which to conclude that Mr. Swirsky's testimony could not be believed. Discrediting Mr. Angel alone would not have rendered Mr. Swirsky credible, because the jury had received an abundance of additional evidence challenging Mr. Swirsky's credibility. And even if Mr. Swirsky's testimony was rendered credible by Mr. Angel's discredit, the jury could not have found defendant guilty without also finding separate reasons for rejecting the evidence presented in favor of defendant's innocence, including defendant's own testimony that he was not guil-

ty of the crimes charged. Such reasons were available among the other evidence of guilt submitted by the government, including the extensive, damaging testimony of John Sliker. In short, Mr. Angel's testimony was marginally important to the extended impeachment effort brought against one of the government's two key witnesses. Given this tangential connection between Mr. Angel's testimony and the issue of defendant's guilt or innocence, I find that undermining Mr. Angel's believability could not in any way be seen as swaying the jury toward convicting defendant Marino. *See,* e.g., *U.S. v. Worthington,* 698 F.2d 820 (6th Cir. 1983); *U.S. v. Bagnaroil,* 665 F.2d 877 (9th Cir.), *cert. denied,* 456 U.S. 962 (1981); *Stynchombe,* 609 F.2d at 195-96.

Given this conclusion, I find it unnecessary to decide whether the extra-record facts at issue give rise in the first place to a presumption of prejudice. Even where a presumption established, it would be rebutted by the virtual irrelevance of Mr. Angel's testimony to the issue of defendant's guilt or innocence.

Plaintiff has not raised a claim that the introduction of extra-record facts denied him due process under the fifth amendment. I note, however, that due process does not require that a defendant receive a jury free of extraneous influence. It requires only "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurences and to determine the effect of such occurences when they happen." *Smith v. Phillips,* 455 U.S. 209, 217 (1982). Defendant received all the process he was due under *Smith.*

In conclusion, I find that the court does not lack jurisdiction over this matter; that the jury verdict is not

against the weight of evidence; that no error was made in refusing to charge the jury on entrapment; that other unspecified rulings of the court denying pre-trial motions, requests to charge the jury, and exceptions to the jury charge made by defendant do not require reconsideration; and that the presentation of extra-record facts to the jury did not violate defendant's sixth amendment rights in a manner which caused defendant prejudice, and did not violate defendant's fifth amendment rights.

APPENDIX B—DOCKET AND ENTRY JUDGMENT OF TRIAL COURT 5/11/87

1-13-87—N. MARINO—Hrg. on motion of deft. for a new trial, re letters from jurors. The Court conducted an individual inquiry of the jurors. ORDERED hrg adjourned w/out a date. (Ackerman) (1-12-87)

1-21-87—C. KELLY—ORDER extending the time to voluntarily surrender to the Federal Prison Camp, Lewisburg, Pa. to June 29, 1987, filed. (Ackerman)

1-22-87—N. MARINO—*Transcript of Proceedings* held on 1-12-87, filed.

2-11-87—N. MARINO—Hearing on motion of deft. for new trial re: letters from jurors. Court conducted individual inquiry of juror (Barbara Blair—5622). Decision Reserved. Ordered govt brief to be filed by 2-25-87. Ordered deft brief to be filed by 3-4-87. Ordered hearing adj. (Ackerman) (2-10-87)

2-11-87—N. MARINO, S. ROMANO—Transcript of Proceedings, Excerpt, of 9-17-86 filed 2-11-87

4-22-87—N. MARINO—OPINION, filed. (Ackerman)

4-22-87—N. MARINO—ORDER denying deft's motions for arrest of judgment, relief from the jury verdict and a new trial and that the sentencing date for deft. is scheduled for 5-11-87, filed. (Ackerman)

4-27-87—J. SLIKER—Judgment and Commitment ORDER filed 4-27-87 (Ackerman)

4-28-87—N. MARINO—JUDGMENT and ORDERED that the deft is not guilty of the offenses charged in Ct 2 of the Indictment filed 4-27-87 (Ackerman)

4-28-87—S. ROMANO—JUDGMENT and ORDERED that the deft is not guilty of the offenses charged in Cts 1, 2 and 3 of the Indictment filed 4-27-87 (Ackerman)

4-28-87—J. SLIKER—SENTENCE: 1 yr to run consecutively to sent. of the Southern District of New York in Cr. 83-691. Hearing on application of govt to dismiss Cts 2 and 3. ORDERED application GRANTED. OTBS (Ackerman) (4-27-87)

5-8-87—N. MARINO—Certification of review of presentence report, filed. (Ackerman)

5-11-87—N. MARINO—Minutes of 5-8-87 re: SENTENCE: deft N. Marino Ct 1: 18 months Fine of $2,500.00. Ct 3: 18 months concurrent to ct 1. Fine $2,500.00 not concurrent. Voluntary surrender to a designated institution.

APPENDIX C—DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT 12/23/87

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5339

UNITED STATES OF AMERICA

v.

NICHOLAS MARINO

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal No. 86-36)
District Judge: Hon. Harold A. Ackerman

Argued October 21, 1987

Before: HIGGINBOTHAM, SCIRICA and GARTH,
Circuit Judges
(Filed DEC 23 1987)

MEMORANDUM OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This is an appeal from the order of the district court denying the motion of appellant Nicholas Marino for a new trial following a judgment of conviction. Marino argues that the decision of the district court, denying a new trial because the extraneous matter that reached the jury did not prejudice the verdict, was an abuse of discretion, and that the district court's refusal to instruct the

jury on entrapment was an error of law. We hold that the district court's conclusion that the extraneous matter did not prejudice the verdict was not clearly erroneous and that its refusal to instruct the jury on entrapment was not an error of law. Accordingly, we will affirm the judgment of the district court.

I.

Marino, a practicing tax attorney, was accused of one count of conspiracy to transport stolen property in interstate commerce and two counts of receiving, selling and disposing of stolen property moving in interstate commerce. The property was two separate packages of bearer bonds.

Marino testified that he was owed approximately $110,000 by an individual named Jack Sliker[1] as a result of business dealings. Sliker offered to give Marino a package of $975,000 in bearer bonds of the City of Fort Meyers, Florida, that Marino could sell, thereby reducing Sliker's debt.

Appellant arranged to sell the bonds to Morton Swirsky, who, unknown to Marino, was at that time acting as a government informant. This arrangement was a result of an agreement with respect to recent charges brought against Swirsky for possession of stolen bonds. It is uncontested that, after Marino learned that Sliker had bonds to sell, Marino was contacted by Swirsky with an offer to

1. Sliker was originally charged as a co-defendant. Sliker pleaded guilty before trial and testified against Marino. Sliker's testimony revealed that he was not at any time acting as a government agent or informant during his dealings with Marino.

buy bonds. A dispute arose between Marino and Swirsky as to whether the Fort Meyers Bonds were legitimate or worthless photocopies. Marino returned the Fort Meyers Bonds to Sliker, who then gave Marino $1,000,000 in Federal Home Loan Bank Bonds. He delivered the bonds to Swirsky, at which time Marino was arrested by the FBI.

At trial, Gulkin, Marino's law partner, testified under a grant of immunity that he was aware that the bonds offered by Sliker were most likely stolen, based upon their low price. Marino claimed throughout the trial, however, that he did not know of the stolen nature of the bonds.

Marino asserts two grounds on this appeal: 1) that the district court abused its discretion by denying a new trial despite its finding that the extraneous matter that reached the jury did not prejudice the verdict; and 2) that the district court erred by refusing to instruct the jury on the issue of entrapment, despite Marino's testimony that he did not know the property he possessed was stolen.

II.

We begin by analyzing the claim of extraneous influence on the jury. The district court conducted a hearing into the nature of the extrinsic evidence and its possible prejudice to the verdict. Post-trial testimony at the hearing revealed that some extrinsic evidence had reached the jury. One juror, employed by a large bank, testified that he was made aware by a co-worker that the FBI had subpoenaed bank records of a witness in this case. During the trial, the witness had testified that he did not have certain accounts with that bank. That juror casually mentioned the subpoena incident at the bank to some other jurors. The other jurors were questioned regarding any extraneous information that they had heard. Those who remembered hearing

about the bank records subpoena testified that it had no effect on them. In addition, the district court, at trial, had instructed the jurors only to consider the testimony and evidence presented in reaching a verdict.

Following a considered review of the details and circumstances of the case, the district court concluded that there was no logical and rational connection between the extraneous influence and possible prejudice, and that mere speculation as to prejudice was insufficient to require the verdict to be overturned. It therefore upheld the verdict, based upon a finding that there was no possibility of prejudice affecting the verdict.

This Court will accept factual findings of the district court unless they are clearly erroneous. We hold that the findings do have a reasonable basis in the record evidence, and, therefore, we hold that the district court did not abuse its discretion when it denied Marino's motion for a new trial on this ground.

III.

Marino argues that the district court erred as a matter of law by refusing to instruct the jury on entrapment. At trial, he admitted most of the operative facts underlying the charges. He denied, however, knowing that the bonds were stolen. Knowledge of the stolen character of the property is a necessary element of receiving stolen property, the offense with which Marino was charged.

At trial, Marino requested an entrapment instruction. The district court denied the request and did not instruct the jury on entrapment. It is well-settled federal law in this Circuit that a defendant may not contest an essential element of an offense and still claim the defense of entrap-

ment. *United States v. Watson,* 489 F.2d 504, 507 (3d Cir. 1973).

Since *Watson,* this rule has been followed in each subsequent decision in which we have confronted this issue. *See United States v. Hill,* 655 F.2d 512, 514 (3d Cir. 1981) (defendant of subnormal intelligence claimed to have been unable to form criminal intent); *United States v. Shoup,* 608 F.2d 950, 964 (3d Cir. 1979) (defendant claimed he owed no duty to government and therefore could not have conspired to defraud it); *United States v. Levin,* 606 F.2d 47, 48-49 (3d Cir. 1979) (defendant admitted supplying food stamps but denied knowing it was illegal to do so).

In *United States v. Jannotti,* 673 F.2d 578 (3d Cir.) *(in banc), cert. denied,* 457 U.S. 1106 (1982), this rule was discussed with regard to a defendant who claimed that the money he received in an "Abscam" related investigation was not a bribe, but rather was a "consulting fee." The district court adopted an "operative facts" theory, allowing an entrapment instruction when the defendant admits most of the operative facts underlying the charges. This Court reversed. We held that, because knowledge that the money was intended as a bribe was an element of the Hobbs Act offense, the defendant was not entitled to an entrapment instruction if he denied a necessary element of the offense, i.e., that the money was a bribe. 673 F.2d at 601.

This appeal presents a similar set of circumstances. Marino admitted most of the operative facts, but he did not admit that he knew of the stolen nature of the property involved. The district court correctly applied the law in refusing to instruct the jury on the entrapment defense where the defendant has not admitted an essential element of the offense.

We note that the Circuits are split on the issue of whether the defense of entrapment is available to a defendant who denies intent where intent is an essential element of the offense. In a case which illustrates this split, the Supreme Court has recently granted certiorari. *United States v. Mathews,* 803 F.2d 325 (7th Cir.), *cert. granted,* __ U.S. __, 107 S. Ct. 1601 (No. 86-6109), *argued* Dec. 2, 1987, 56 U.S.L.W. 3398-99 (U.S. Dec. 8, 1987). Mathews was convicted of accepting a thing of value as a public official for an official act to be performed by him. At trial, Mathews had claimed that the money given to him was a personal loan that was not related to his governmental duties. The district court refused to instruct the jury on entrapment because Mathews did not admit all the elements of the offense, including the element of intent. The Court of Appeals for the Seventh Circuit affirmed, refusing to change its rule requiring a defendant to admit all elements of an offense before being allowed to plead entrapment. The Court of Appeals stated that its rule is in accord with the law of the Courts of Appeals for the Third, Sixth and Tenth Circuits. Mathews argued that a better rule, as adopted by the Courts of Appeals for the First, Fifth and District of Columbia Circuits, requires a defendant only to admit the acts of a crime and not the intent. The court concluded that, "[w]hen a defendant pleads entrapment, he is asserting that, although he had criminal intent, it was the 'Government's deception [that implanted] the criminal design in the mind of the defendant.' " 803 F.2d at 327 *(quoting United States v. Russell,* 411 U.S. 423, 436 (1973)). The court added that it was "inconsistent per se" to allow a defendant to deny intent and plead entrapment.

In this case, the district court did not err in refusing to instruct the jury on entrapment, correctly applying the well-settled law of this Court.

For the foregoing reasons, we will affirm the judgment of the district court.

TO THE CLERK:

Please file the foregoing opinion.

s/ A Higginbotham
Circuit Judge